"All citizens are equal before law and are entitled to equal protection of law"Article 27 of the Constitution of the People's Republic of Bangladesh

The Myth of Parliamentary Sovereignty

by A. H. Monjurul Kabir

THE debate is nothing new, however unfortunate or artificial it might be. The issue whether the Parliament of Bangladesh (House of the Nation) is sovereign has recently been stirred up again. Many ministers and parliamentarians, including the Parliamentary Advisor to the Prime Minister Suranjit Sen Gupta claimed that the legislature is sovereign. In a surprising bid to establish parliamentary control over judiciary, Mr. Gupta demanded the reintroduction of the provision of the original constitution, which allows removal of judges for misconduct by two-third-majority votes in the parliament. The lawmakers from the ruling party also asserted that the judiciary is not independent of parliament. The debate is unfortunate as the claims and assertions are clearly devoid of substance and against the spirit and the letter of the constitution. It is rather artificially created a controversy to confuse the minds of the ordinary public.

A Parliament with Limited Law-making Competence

The supreme law of Bangladesh, the Constitution, confers only limited law making competence on Parliament. Unlike the British Parliament, the Bangladesh Parliament is created by, and operative under a written constitution. Parliament does not possess any intrinsic law-making power, which derives from the constitution. As Article 7 proclaims:

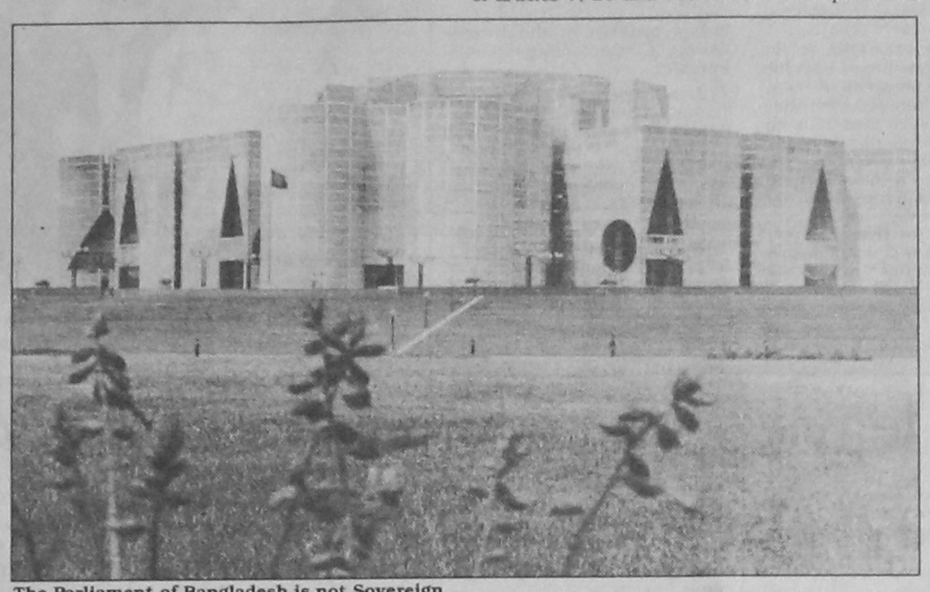
7. (1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effected only under, and by the authority of this constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the republic, and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void.

The law-making power of the parliament, therefore, must be exercised within defined constitutional periphery and anything beyond that will not gain constitutional validity. The parliament can not make any law in contravention with the provisions of the constitution. Article 26(2) iterates:

26(2) The state shall not make any law inconsistent with any provision of this part, and any law so made shall, to the extent of such inconsistency, be void.

In Anwar Hossain Chowdhury and Others vs. Bangladesh (1989), popularly known as 'the 8th Amendment Case', the court held that the amendment to Article 100 establishing six permanent branches of the High Court Division changed the basic structure of the judiciary under the original constitution. The court declared this amendment ultra vires the Constitution and void as the parliament lacked the competence to amend the basic structure of the constitution.



The Parliament of Bangladesh is not Sovereign

A Supreme Court with the Power of Judicial Review

In a written constitutional regime, the judiciary is the guardian of the constitution. In Britain where the constitution is unwritten, the theory of sovereignty of parliament demonstrates itself in the power of the courts. Any law enacted by Parliament and assented by the Crown becomes the law of the land and can not be altered or challenged by the British courts. That is not the case in Bangladesh. A combined reading of articles 7, 26 and 108 of the Constitution of Bangladesh testifies that full judicial power have been granted by it on the Supreme Judiciary as an independent organ of the state. It has power to declare a law passed by the legislature inconsistent with the constitution or fundamental rights ultra vires. It has also been conferred with the power of judicial review of executive acts and other judicial acts and proceedings of subordinate courts or tribunals under Article 102. The purpose of such empowerment is to maintain required checks and balances between the government organs. The court exercised such power in a number of cases including the historic 8th Amendment Case.

Attempt to Make Judiciary Subservient

Taking the advantage of parliamentary immunity ministers and MPs bitterly criticised the role and performance of the Supreme Court. They demanded the power to remove a judge from his seat for his alleged misconduct. Such desire to make the judiciary subordinate to parliament based on blatantly wrong perception of parliamentary sovereignty is, in any consideration, dangerous to the notion of democracy and the rule of law. It is aimed at destroying the independence of judiciary and thereby trying to make the judiciary subordinate to the executive. In essence, their desire is anti constitution as the constitution is very particular about the independence of the judiciary. In article 22, the constitution expresses that "the state shall ensure the separation of the judiciary from the executive organs of the state". Article 94 (4) categorically states that "...the Chief Justice and the other judges shall be independent in the exercise of their judicial functions." Article 112 specifies that " All authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court." The parliamentarians will have to remove these crystal-clear dictates of the framers from the constitution before they should create any such confusion. It must be remembered that any attempt by the executives or the lawmakers to tame the judiciary for making it subservient to the other, is unconstitutional and therefore illegal as long as we have our constitution remains in force.

Maintaining a Fine Balance

Maintaining a fine balance between the three organs of the state e.g., the executive, the legislature and the judiciary is crucial to the functioning of a democracy. The Constitution of Bangladesh proclaims its own supremacy and all organs of the state have to discharge their obligations accordingly. Each organ derives its origin and authority from the constitution and has to act within respective constitutional constraint. Any negation of the institutional check and balance principle will geoparadise the state of constitutional governance in Bangladesh.

From Law Desk ...

Declaration on Elimination of Torture in Asia

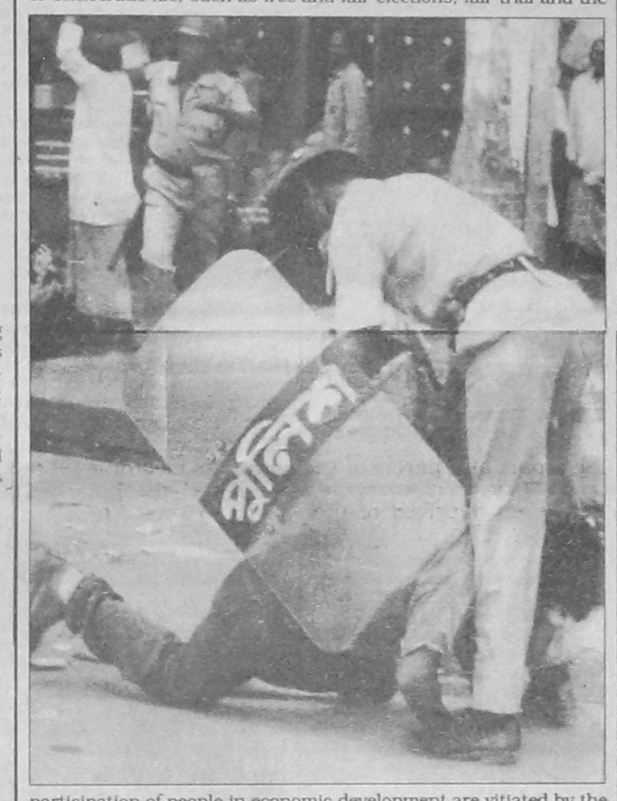
THE following is the declaration on elimination of torture in Asia by participants at the seminar organized by the Religious Groups for Human Rights - of a Programme of Asian Human Rights Commission.

1.Twenty-five participants from ten Asian countries gathered in Bangkok from 5-10 November 2000 to discuss the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The participants unanimously agreed that throughout Asia acts of torture and degrading punishment are highly prevalent and pose a threat to the human rights of the people of Asia. So long as law enforcement authorities continue to practice torture, people will perceive them not as guardians of the law but as violators of human rights. Asian communities living under the threat of such grave violations need to take a more active part in influencing the law enforcement authorities of their countries to alter methods of criminal investigation and other dealings with the members of their communities.

2. Violations of all human rights whether civil and political or economic, social and cultural begin with the use of torture and degrading treatment or punishment. Promotion and protection of all human rights therefore requires the prevention of torture and degrading punishment. This is especially the case regarding the rights of women. The protection of their rights requires the elimination of violence both in the public and private spheres.

3. In conflict-ridden areas of Asia there is much talk about peace and conflict resolution, however such objectives are unachievable without the elimination of torture and inhuman punishment. Many violent conflicts in Asia have begun due to extreme use of torture and degrading treatment or punishment on sections of the population, particularly upon the young. Acts of torture and inhuman punishment invariably give rise to extra-judicial killings. Study of extra-judicial killings and disappearances in Asia reveals that such atrocities are clearly rooted in hardened practices of torture and inhuman treatment by law enforcement agencies.

4. We, the participants at this seminar, note that the widespread use of torture poses the greatest threat to development of democratic institutions in Asia. So long as the people perceive law enforcement agencies as fearsome places where violent persons exercise their power over civilians with impunity, no trust can be built for cooperation. Such fear exists everywhere in Asia. The use of law enforcement agencies for political ends has aggravated the situation. All aspects of democratic life, such as free and fair elections, fair trial and the



participation of people in economic development are vitiated by the use of torture and degrading punishment.

5. In international law, torture is today considered among the highest of crimes, the gravity of which is comparable to crimes against humanity and war crimes. The jurisdiction against torture is not confined to domestic courts, but is extended universally. However an examination of case law in the Asian region does not reveal a reflection of international law on this matter. Often local courts in the region seem to take a less serious approach and thereby condone the wide practice of torture and other inhuman treatment. A change of approach in the local courts, in keeping with international law on torture, is an essential element in altering this age-old practice ingrained in Asian societies. To create an atmosphere of intolerance to torture among the judiciary, education of international law on torture and sharpening of judicial sensitivity by way of social criticism are essential.

6. Community leaders, community organizations and public opinion makers have a paramount role in the formation of social policy to eliminate torture in criminal investigation and all other dealings of law enforcement agencies with society. Sadly, their record of involvement in the elimination of torture is rather negligible. In some instances political leaders exploit law enforcement agencies for personal ends and thus encourage the practice of torture and degrading treatment of their opponents and others. Such short-sighted approaches encourage law enforcement authorities to use the same methods for their own ends. Thus the age-old institutional habits of torture and degrading punishment get further entrenched. Under such circumstances the law enforcement authorities can become a threat to the continuity of democracy itself, as demonstrated by the recent experiences of several Asian countries. A change in attitudes of community leaders, community organizations and public opinion makers is essential if this grave abuse of human rights is to be eliminated.

7. Leaders of religious organizations and all who advocate the promotion of basic human values need to take a far greater interest in the elimination of torture than they have done in the past. Religious leaders and their organizations have not shown a great resistance to the evil practice of torture and degrading treatment; there is not much in the record of their activities and statements to show that they are actively resisting and morally condemning this practice. A morally tolerant attitude towards torture and degrading treatment has serious impact on the promotion of the human dignity of all persons. This moral apathy against a widely practiced social evil needs to be negated. 8. Civil society organizations, NGOs and all concerned persons need to demonstrate much greater will to eliminate this social evil. An Asia-wide campaign for elimination of torture needs to be undertaken and pursued with determination. So long as such barbaric practices prevail within law enforcement agencies it will not be possible for civil society organizations to make a contribution to their societies. Ultimately the onus is on those advocates of democracy and human rights to see that such practices are applied. In order to create space for people's participation in the democratic process, it is essential that activities to eliminate the practice of torture be undertaken with greater vigour.

Problems of Our Civil Justice System

by A K Roy

Bangladesh's civil justice system suffers from several drawbacks and constraint: (i) It is subject to excessive delays. On average, a civil matter takes about 5 years from filing to decision in a District Court. In some cases, the total period from filing in the first instance court to decision by the appellate court may extend to something like 15 to 20 years. Nor is it unusual for a case to take about 3 years from filing to setting down (for a first hearing) (ii) Court management system is insufficient and lacks accountability for case management and backlog and case tracking system does not exist (iii) There is excessive judicial passivity in managing cases and excessive control of litigants and their lawyers over case processing (iv) Case processing is indisciplined, protracted, discontinuous and fragmented (v) Equipment and tools for judicial work are of the pre-World War II type and even these are in short supply (iv) Also in short supply are printed forms required to be used in case processing and court work thereby necessitating preparation of forms by hand which is time consuming and which adds to delay in case processing (vii) Because of absence of court supervised or private alternative dispute resolution mechanisms, protracted, discontinuous and fragmented full trial remains as the only alternative (viii) Judges spend excessive time on administrative work at the expense of judicial work (ix) Gender awareness is inadequate and needs to much more widespread (x) Court infrastructure is deficient for its proper functioning.

The judicial system lacks the capacity to plan and manage its own affairs. There is no system of national administration administration of the judicial judicial branch. Elements of a basic administrative system exist, but these are dispersed throughout the governmental system, and the structure itself needs to be updated and modernized. Budgeting, planning (of which there is very little anyway) and technical assistance are the responsibility of Ministry of Law. The highest administrative officer who also has some judicial functions, is the Registrar of the Supreme Court, but he does not serve as the overall administrator of the court system as such. At any rate, the office that he heads is antiquated and rudimentary in organization, and there is no planning function. The spending authority delighted to him is minuscule. A reliable financial and statistical reporting system does not exist. The records management system is most basic. The District judge may or may not be suited for administrative work by temperament or training, and such work in any case too much into judicial time.

The Judicial system is perceived as lacking in transparency and accountability. Candidates for judicial appointments are not generally screened through a wide and open consultative process involving other judges and senior members of the bar or civil society representatives. Impeachable judicial conduct rarely invited punishment, largely because of the practical difficulties of invoking the relevant of invoking the relevant disciplinary mechanisms, which are dilatory, inaccessible and non-transparent, and therefore non-functional. There is no uniform code of conduct for the judiciary as a whole: separate sets of rules of statements of principles are stipulated for the superior and the "subordinate" judiciary, suggesting different standards for different judges. There are no effective performance standards for the judges and their staffs.

The judicial system is inequitable as it widens the gulf between the wealthy litigant, who can cope with the system, and the poor or other vulnerable litigant, who cannot. Women are poorly represented both at the bar and on the bench. Court-fees are too high for poor litigants to afford. Very few of them quality for exemption under the law. A state-sponsored legal aid system of sorts exists, but this is rarely used, either because the vulnerable litigant does not know the system very well or because he/she finds the state-appointed functionaries who control the system too intimidating to approach. Certain NGOs offer free legal aid as part of their ADR work, of which there are many successful examples. There are based largely upon traditional community structures for dispute settlement in localities (shalish), which the NGOs have adapted to the special needs of the underprivileged to good effect. These can be built upon to advantage.

The judicial system is incomprehensible as it denies the litigating public access to information and induces a fear of the unknown in them. There are at present no state sponsored legal literacy and public awareness programmes in existence. Again some of the NGOs combine their legal aid activities with such programmes, but these programmes are weak and in need of additional resources. There is no central source through which the law can be located and it can be ascertained whether or not the law has been changed, an, if so, how often and to what extent. Ministry of Law's own annotated laws are incomplete and badly out of date. The official gazette which records and confirms laws and changes to them is not always promptly published.

The Civil justice system is unable to cope with the rapidly mounting case backlog. Figures for total filings, dispositions and pending cases available for the years 1993 through 1998 disclose as follows:

Year-wise statistics of filing, disposal and pending cases in the subordinate courts from 1993-1998

Year	Classification of case	No of Filings	No of Disposals	No of Pendings
1993	Civil	135,623	128,513	306,075
	Criminal	51,314	48,777	73,449
	Total	186,937	177,290	379,524
1994	Civil	171,497	135,146	320,112
	Criminal	57,101	51,846	74,225
	Total	228,598	189,992	394,337
1995	Civil	157,750	139,698	331,418
	Criminal	55,201	45,751	85,310
	Total	212,951	185,445	416,739
1996	Civil	127,511	108,385	341,433
	Criminal	60,723	49,604	77,273
	Total	188,234	157,989	418,706
1997*	Civil	143,496	112,384	347,584
	Criminal	64,720	57,924	82,226
	Total	208,216	170,308	429,810
1998	Civil	138,521	110,294	347,325
	Criminal	60,023	52,812	76,315

While these figures aggregate all manner of cases field and heard, including civil suits, criminal appeals and constitutional petitions, the trends suggested by them are very clear, particularly insofar as they apply to civil justice. In the High Court Division, despite valiant attempts to increase the rate of disposal, the number of pending cases has continued to rise because the number of filings has continued to rise faster than the rise in the rate of disposal. In the Subordinate Courts, the number of new filings has not always increased from one year to another, yet the number of pending cases has continued to increase because of the courts' rather mixed record of increasing their rate of disposal.

There is an urgent need to promote the efficiency and productivity of the system. This can be done, among other things, through modern caseload management system; improved court administration; providing adequate logistic support including typewriters, photocopy machines and simple automation; expanding and renovating courtrooms; judicial and non-judicial training; improved terms and conditions of service; and increased judicial accountability. There is an urgent need also to improve access to justice. This can be done, among other things, by improving legal aid and introducing measures to raise the level of gender consciousness.

Reference: Justice Badrul Haider Chowdhury, Cover Note for the World Bank Project on Legal and Judicial Capacity Building Project (1998).

The writer is a District and Sessions Judge currently on deputation working in the Ministry of Law and Parliamentary Affairs.

Preventive Detention in India:

Constitutional Tyranny?

THE establishment of the National Commission to Review the Working of the Constitution (NCRWC) has created a stir in Indian politics. Many have questioned the motives of the Bharatiya Janata Party Government in creating such a commission. Yet, there is no denying the fact that the Constitution of India has several flaws. The preventive detention regime surely ranks among its worst, and the Commission perhaps provides the opportunity to repair that problem.

India is one of the few countries in the world whose Constitution allows for preventive detention during peacetime without safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights. For example, the European Court of Human Rights has long held that preventive detention, as contemplated in the Indian Constitution, is illegal under the European Convention on Human Rights regardless of the safeguards embodied in the law. South Asia Human Rights Documentation Centre (SAHRDC), in its submission to the NCRWC in August 2000, recommended deleting those provisions of the Constitution of India that explicitly permit preventive detention.

Specifically, under Article 22, preventive detention may be implemented ad infinitum -- whether in peacetime, non-emergency situations or otherwise.

The Constitution expressly allows an individual to be detained -- without charge or trial -- for up to three months and denies detainees the rights to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention. In short, preventive detention as enshrined under Article 22 strikes a devastating blow to personal liberties.

It also runs afoul of international standards. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) -- which India has ratified -admittedly permits derogation from guaranteeing certain personal liberties during a state of emergency. The Government, however, has not invoked this privilege, nor could it, as the current situation in India does not satisfy with standards set forth in Article 4.

If preventive detention is to remain a part of India's Constitution, it is imperative that its use be confined to specified, limited circumstances and include adequate safeguards to protect the fundamental rights of detainees.

Particular procedural protections are urgently needed (i) to reduce detainees' vulnerability to torture and discriminatory treatment; (ii) to prevent officials' misusing preventive detention to punish dissent from Government or from majority practices; and (iii) to prevent overzealous government prosecutors from subverting the criminal process. In pursuit of these goals, SAHRDC made the following recommendations in its submission to the NCRWC:

First, Entry 3 of List III of the Constitution of India, which allows Parliament and state legislatures to pass preventive detention laws in times of peace for "the maintenance of public order or maintenance of supply and services essential to the community," should be deleted. Assuming that preventive detention could be justified in the interest of national security as identified in Entry 9 of List I of the Constitution, there is still no compelling reason to allow this extraordinary measure in the circumstances identified in Entry 3 of List III.

Second, lacking clear guidance from the Constitution, courts have applied vague and toothless standards -- such as the subjective "satisfaction" of the detaining authority test -- to govern the implementation of preventive detention laws. If preventive detention is to remain in the Constitution, constitutional provisions must include well-defined criteria specifying limited circumstances in which preventive detention powers may be exercised -- and these standards must be designed to allow meaningful judicial review of officials' actions.

Third, under Article 22(2) every arrested person must be produced before a magistrate within 24 hours after arrest. However, Article 22(3)(b) excepts preventive detention detainees from Clause (2) and, as a consequence, it should be repealed in the interest of human rights. At present, detainees held under preventive detention laws may be kept in detention without any form of review for up to three months, an unconscionably long period in custody especially given the real threat of torture. At the very least, the Government should finally bring Section 3 of the Forty-fourth Amendment Act, 1978 into effect, thereby reducing the permitted period of detention to two months. Though still a violation of international human rights law, this step would at least reduce the incidents of torture significantly.

Fourth, the Advisory Board review procedure prescribed by the Constitution involves executive review of executive decision-making. The absence of judicial involvement violates detainees' right to appear before an "independent and impartial tribunal", in direct contravention of international human rights law including the ICCPR (Article 14(1)) and the Universal Declaration of Human Rights (Article 10). The Constitution must be amended to include clear criteria for officials to follow, and subject compliance with those standards to judicial review.

Fifth, the Constitution provides that the detaining authority must refer to the Advisory Board where detention is intended to continue beyond three months. No provision exists for the consideration of a detainee's case by the Advisory Board more than once. Yet, periodic review is an indispensable protection to ensure that detention is "strictly required" and fairly administered. Hence, the Constitution should mandate periodic review of the conditions and terms of detention.

Sixth, detainees must receive detailed and prompt information about the grounds of their arrest. Currently, the detaining authority is required only to communicate the grounds of detention to the detainee "as soon as may be" after the arrest. Article 9(2) of the ICCPR provides that "[a] nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Detainees must be guaranteed a minimum period in which the grounds are promptly communicated to them, and be given information sufficient to permit the detainee to challenge the legality of his or her detention

In keeping with the overriding spirit of the Constitution and with minimum standards of international human rights law, it is essential that the Constitutional reforms discussed above be adopted. The process set in motion by establishing the NCRWC provides a unique opportunity for such an important realignment of India's Constitution with prevailing international human rights standards. The key will be political willpower and the commitment to seeing justice done.

-Human Rights Features

Open Discussion on Impunity of Law Enforcing Agencies

Corruption, malpractice and abuse of law and procedure are rampant in the rank and file of the police and related intelligence and investigating agencies. Their members are involved in torture, rape, death in custody, cruelty to women and children, harassment of women and what not. Yet impunity for law enforcers the failure to bring those responsible for gruesome crimes is endemic. A successful prosecution to be brought against an alleged member of law enforcing agency requires a combination of extraordinary circumstances. Odhikar, a coalition for human rights, in co-operation with Bangladesh Freedom Foundation will hold an open discussion on 'Impunity of Law Enforcing Agencies' tomorrow on 27 November at 2 P.M. at CIRDAP Auditorium.